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IN THE

Supreme Court of the United States

No. [redacted]. 13 October Term, 1932.

THE TRAINOR COMPANY,

Petitioner,

v.

THE AETNA CASUALTY AND SURETY COMPANY,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States.

No. 797. October Term, 1932.

THE TRAINOR COMPANY,

Petitioner,

v.

THE AETNA CASUALTY AND SURETY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I. JURISDICTION.

"A review on Writ of Certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and immediate reasons therefor." (Rule 38 (5) of this Court.)

It is respectfully submitted that, for the reasons hereinafter set forth by the respondent in its argument, the facts as set forth by The Trainor Company in its Petition for Writ of Certiorari do not present any special or important reason for this Court to exercise its discretion and to grant the Writ of Certiorari sought by the petitioner herein.

II. THE QUESTIONS OF LAW INVOLVED.

The Petition in this case raises only the following questions of law:

1. Did the District Court and the Circuit Court of Appeals err in holding that there is no substantial difference between the measure of damages recoverable by a mortgagee-obligee for the breach of a bond giving an absolute guarantee of completion and for the breach of a bond indemnifying against loss for failure to complete?

2. Did the District Court and the Circuit Court of Appeals err in holding that the measure of damages due to a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation is limited to the difference between the value of the property in the condition in which it existed at default and the amount of principal and interest due on the mortgage and all prior liens?

3. Did the District Court and the Circuit Court of Appeals err in holding that the measure of damages to be applied in the instant case was a matter of general law concerning which the Federal Courts may exercise their independent judgment?

III. ARGUMENT.

Point A.

There Is No Substantial Difference Between the Measure of Damages Recoverable by a Mortgagee-Obligee for the Breach of a Bond Giving an Absolute Guarantee of Completion and for the Breach of a Bond Indemnifying Against Loss for Failure to Complete.

It is true that indemnity and guaranty completion bonds in favor of a mortgagee-obligee differ in this respect: namely, in the former, the compensation is measured by an anticipated loss; while in the latter by an actual loss. Or, in other words, in the former, the right of action does not accrue until the plaintiff has sustained a monetary loss; while in the latter, the right of action accrues immediately upon the breach. However, once the right of action has accrued, the mortgagee-obligee, irrespective of the type of the bond, is entitled to recover the same amount of damages as compensation for the loss which it has sustained. *Purdy v. Massey,* 306 Pa. 288, 297, 159 Atl. 545, 548 (1932) (dissenting opinion).

The basis for a different measure of damages in the various cases where the contractor has failed to complete his building operation does not lie in the nature of the completion bond but rather in the status of the obligee with respect to the building operation.

Where the owner is the obligee, his bargain contemplates the payment by him of a certain amount of money for a completed building and the contractor agrees to put the building on the premises for the specified price. It is

the performance of that contract which is guaranteed by the surety company. If the contractor defaults, the situation is analogous to any other case in which a plaintiff seeks to recover as damages "the benefit of his bargain" which is the difference between the contract price and the reasonable and market cost of completion. In contemplation of law the owner has suffered a legal damage when he has been deprived of the benefit of his bargain to have a building erected at a certain price and, if it will cost the owner more to have the building erected, he is entitled to recover that excess whether or not he ever actually constructs the building. *Union Indemnity Co. v. Vettor,* 40 Fed. (2d) 606 (C. C. A. 5th 1930).

Such a situation differs vastly in fact and in legal significance from the case in which the obligee under a completion bond is a mortgagee and not an owner. In such case the obligee-mortgagee is equally entitled as against the surety company to the benefit of his bargain; but the determination of exactly what constitutes the bargain involves a totally different problem as to the measure of damages. Where a surety company guarantees to a mortgagee a completed building, the mortgagee-obligee has no interest in the premises or the building to be erected, other than as security for the mortgage obligation. The bargain contemplates that the premises shall be enhanced by the erection of the proposed building. That is the only interest which the mortgagee has in the building.

If, therefore, the contractor defaults and the building is not fully erected, the legal interest of the mortgagee which is adversely affected and which the law will be compelled to protect, and as to which compensation may be claimed, *is the loss to the mortgagee of his security by reason of the contractor's default.* Thus the mortgagee

obligee is entitled to recover as damages the amount by which the security has been depleted by the failure of the contractor to perform, or so much of the difference between the value of the completed and uncompleted operation as would be necessary, together with the value of the property in the condition in which it is left by the contractor, to pay the mortgage debt and the interest thereon. *Province Securities Corp. v. Maryland Casualty Company,* 269 Mass. 75, 168 N. E. 252 (1929).

While the general language in the case of *Purdy v. Massey, supra,* may lend support to the petitioner's proposition, it is submitted (as is hereinafter more fully set forth) that the authorities cited therein do not sustain the broad and sweeping language used by the Court and that the case should be restricted to its own peculiar facts. With regard to the case of *Weightman v. Union Trust Co.,* 208 Pa. 449, 57 Atl. 879 (1904) (also cited by the petitioner), it should be noted that the question then before the Court was whether the mortgagee-obligee had set forth a complete cause of action against the defendant. In no place in said opinion did the Court discuss the measure of damages under which the plaintiff might recover compensation.

The cases of *Wicker v. Hoppock,* 73 U. S. 94 (1867) and *Hay v. Cudaback,* 139 Fed. 369 (C. C. A. 3d, 1905), are not in point although cited by the petitioner as authority of Your Honorable Court and of the Circuit Court of Appeals for the Third Circuit supporting the petitioner's contention. In the former case the defendant had agreed to bid in certain goods of X at a judicial sale at an agreed price if the plaintiff would proceed against X, obtain judgment, and levy on the said goods. The plaintiff fulfilled his part of the agreement but the defendant failed to bid at

the sale. The plaintiff therein was allowed to recover the amount which defendant had agreed to bid. In the latter case the plaintiff, as assignee, recovered from the defendants the amount which the defendants had agreed to pay to the plaintiff's assignor in the event that land which the plaintiff's assignor held as trustee for the defendant was sold on foreclosure and a deficiency judgment was entered against the said assignor. The land in question was sold on foreclosure and deficiency judgment entered against the assignor.

Nor are *Belloni v. Freeborn,* 63 N. Y. 383 (1875) and *Kidd v. McCormick,* 83 N. Y. 391 (1881), authority for the petitioner's contention. The former case involved the defendant surety's guarantee of the payment by its principal of rent for which the plaintiff and defendant's principal were both liable but had nothing to do with a building operation or completion bond. The latter case dealt with the amount which the plaintiff, as a purchase money mortgagee, could recover from a fund deposited as collateral security for the defendant's promise to build certain houses on the said premises. The plaintiff, having foreclosed on default of defendant, completed the operation and recovered from the fund of $3000 his expenditures, and the difference between the value of the houses at default and the value if the same had been completed.

On the other hand in the later case of *Schwartz & Co. v. Aimwell Co.,* 227 N. Y. 184, 124 N. E. 892 (1919), the same Court refused recovery to the plaintiff, which was suing for breach of a guarantee bond, because it had failed to allege that its assignor had or would sustain any loss, the Court nowhere in its opinion discussing the difference be-

tween indemnity and guarantee completion bonds or what effect this difference may have on the measure of damages.

The respondent, therefore, respectfully submits that the measure of damages to be applied in a suit for breach of a completion bond is not dependent on whether the bond is one of indemnity or of guarantee, but rather upon the status of the obligee with respect to the building operation to be completed.

Point B.

The Measure of Damages Due to a Mortgagee-Obligee for the Breach of a Bond Guaranteeing Completion of a Building Operation Is Limited to the Difference Between the Value of the Property in the Condition in Which it Existed at Default and the Amount of Principal and Interest Due on the Mortgage and All Prior Liens.

The measure of damages as above set forth has been adopted in suits by mortgagee-obligees for breach of completion bonds not only by the local District Court (R. 31) and by the Circuit Court of Appeals for the Third Circuit (R. 63), but also by decisions of various State Supreme Courts.

In *Province Securities Corporation v. Maryland Casualty Company,* 269 Mass. 75, 168 N. E. 252 (1929), the defendant bonding company had given a bond to a mortgagee conditioned upon the erection of certain buildings. These buildings were partly erected when the mortgage was foreclosed. The mortgagee bid in the property at considerably less than the amount of its lien and then sued the bonding company. The Court held with regard to the measure of damages that since a mortgagee holds the property for

security only, it could not recover more than the difference between the value of the property at the time of default and the amount due on its mortgage. See also *Norway Plains Savings Bank v. Moors*, 134 Mass. 129 (1883).

The same measure of damages was applied by the Supreme Court of Minnesota in the case of *Longfellow v. McGregor*, 61 Minn. 494, 63 N. W. 1032 (1895), where the mortgagee-obligee sued the surety for breach of bond conditioned on the principal's building a house by a certain date.

In *German American Title & Trust Company v. Citizens' Trust & Surety Company*, 190 Pa. 247, 42 Atl. 682 (1899), the Supreme Court of Pennsylvania adopted a similar rule of damages in the case where the owner of ground rents instituted suit for the breach of a completion bond. The plaintiff was there limited in recovery to the actual loss in the value of the ground rents.

In a dissenting opinion in the case of *Purdy v. Massey*, 306 Pa. 288, 297, 159 Atl. 545, 548 (1932), Mr. Justice Kephart presents a well-reasoned dissertation on this very question, wherein he approves and adopts the principle of law set forth in the aforementioned decisions and also adopted in this proceeding by the local District Court and unanimously affirmed on appeal by the Circuit Court of Appeals.

The petitioner, however, contends that the case of *Mechanics Trust Co. v. Fidelity & Casualty Co.*, 304 Pa. 526, 156 Atl. 146 (1931), and the majority opinion in the case of *Purdy v. Massey, supra*, present the measure of damages applicable to the present suit. The respondent, on the other hand, submits that the former case is distinguishable from the case at bar in that the plaintiff trust company

foreclosed its mortgage, bought the premises at the sale through its straw man, thereafter actually completed the said operation as the owner might have done and later sold the same at a profit. Naturally, the Court in determining the damages due to the plaintiff therein treated it as an owner and allowed it to recover the full sum of moneys *expended* by it in completing the operation. In the case at bar, the petitioner has not spent one penny for the construction of the buildings and was rightly treated as a mortgagee-obligee as distinguished from an owner-obligee. As a matter of fact the $28,000.00 obligation of the Copley Homes, Inc., to The Trainor Company was all profit to the latter company, accruing to it without any capital investment on its part (R. 31), and on which obligation The Trainor Company has received $13,026.02 (R. 35).

The case of *Purdy v. Massey, supra* (decided but with a dissenting opinion) is not so distinguishable from the case at bar but, being contrary to the prevailing decisions in states other than Pennsylvania, should be restricted to its own peculiar facts for the reason that the three authorities cited on page 295 as reported in 306 Pa. do not sustain the conclusions with respect to the measure of damages for which they are cited. *Mechanics Trust Co. v. Fidelity & Casualty Co., supra,* has already been discussed and distinguished. The case of *Equitable Trust Co. v. National Surety Co.,* 214 Pa. 159, 63 Atl. 699 (1906) has been carefully considered and distinguished by Judge Kirkpatrick in his opinion (R. 38), while in the case of *Board of Education v. Maryland Casualty Company,* 27 Fed. (2d) 20 (C. C. A. 3rd 1928) the plaintiff was the owner of the property, not the mortgagee, and, as owner, actually sustained damages in completing the operation.

The respondent further submits that the measure of damages applied in the case at bar by the Trial Judge and unanimously affirmed by the Circuit Court of Appeals is not opposed to the law as stated by Your Honorable Court. On the contrary, counsel for respondent has been unable to discover any decision of Your Honorable Court bearing on the question raised herein by the petitioner. The case of *Wicker v. Hoppock*, 73 U. S. 94 (1867), in which is set forth the general distinction between an obligation to do a certain thing and an obligation to indemnify against loss, is not authority for petitioner's contention. The facts hereinbefore set forth make its inapplicability self-evident.

The respondent further submits that there is no conflict of authority among the Circuit Courts of Appeals for the various Circuits and that there is no such conflict of authority among the Supreme Courts of the various states with regard to the measure of damages applied in the present proceeding as to justify Your Honorable Court's further consideration of this matter and that, therefore, the petition of The Trainor Company for a Writ of Certiorari should be denied.

Point C.

Irrespective of Whether the Question at Issue in the Instant Case Be Considered to Be a Matter of Suretyship or a Matter of Damages Which May Be Recovered for the Breach of a Completion Bond, It Is Still a Matter of General Law Concerning Which the Federal Courts May Exercise Their Independent Judgment.

Swift v. Tyson, 41 U. S. 1 (1842) states that the Federal Courts, regardless of state decisions, will exercise their independent judgment upon questions dependent upon principles of general jurisprudence or relating to general or commercial law.

Questions relating to the law of insurance in general and particularly to its subdivision, suretyship, are considered to fall within the above classification. *Odegard v. General Casualty & Surety Co.*, 44 Fed. (2d) 31 (C. C. A. 8th 1930) (suretyship); *Washburn & Moen Mfg. Co. v. Reliance Ins. Co.*, 179 U. S. 1 (1900) (marine insurance); *Meigs v London Assurance Co.*, 126 Fed. 781 (C. C. Pa. 1904), affirmed 134 Fed. 1021 (C. C. A. 3d, 1905) (fire insurance). In the case of *Meigs v. London Assurance Co., supra,* the District Court not only referred to the aforesaid rule but denied recovery to the plaintiff of that amount which he would have been allowed under the decisions of the Supreme Court of Pennsylvania.

A surety bond or a completion bond is merely another form of insurance which, although it differs from a marine insurance policy or a fire policy as to form and matter insured, is basically the same. Therefore, the law applicable to one type of policy should also govern the other. This natural and rational conclusion was reached in *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 149 Fed. 507 (C. C. Mo. 1906).

Likewise, irrespective of the question of suretyship involved in this case, the measure of damages to be applied is a matter of general jurisprudence and not of local law. *Clark v. Belt*, 223 Fed. 573 (C. C. A. 8th 1915); *Bu-Vi-Bar Petroleum Corporation v. Krow*, 40 Fed. (2d) 488 (C. C. A. 10th 1930) and *Mitsubishi Shoji Kaisha, Ltd. v. Davis*, 291 Fed. 882 (D. C. N. Y. 1922).

It is quite true as stated in 6 HUGHES ON FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1931), page 275, Section 3735, that the Federal Courts will, if possible, follow the state courts with respect to damages in actions at law, just

as they will in other matters of general jurisprudence, but they nevertheless retain the right to form an independent judgment as to what is sound jurisprudence and, when their conclusion is different from that of the local state courts, will apply the common law in accordance with their independent judgment.

Nor is there any conflict of opinion in the various Circuit Courts of Appeals on this question, although such a conflict is stated by the petitioner as one of its reasons (No. 3) for the granting of a Writ of Certiorari. In *Community Bldg. Co. v. Maryland Casualty Co.*, 8 Fed. (2d) 678 (C. C. A. 9th 1925) the Court specifically recognized the aforesaid rule but, in exercising its independent judgment, preferred to follow the local state court, stating in said opinion that in addition to favoring the liberal or local state rule with regard to the construction of a bond requiring notice of default to the surety it believed that Your Honorable Court was likewise more in favor of, although not committed to, said liberal rule.

B. F. Sturtevant Company v. Fidelity and Deposit Company, 285 Fed. 367 (C. C. A. 2nd 1922) likewise recognized that the question of damages was one concerning which it might exercise its independent judgment. There too the Court, after due consideration, preferred to follow the state rule. Furthermore in that case the bond was given to secure the construction of a municipal school building and, although not so stated in the opinion, it was probably furnished pursuant to a state statute or municipal ordinance.

In the case of *Mullins Lumber Co. v. Williamson & Brown Land and Lumber Co.*, 255 Fed. 645 (C. C. A. 4th 1918) the Court applied the state law because, as stated on

page 647 of the opinion, "in a legal sense the primary question involved in the cause was the title to the land; the damages recoverable were incidental to and dependent on the title".

McClain v. Provident Saving Life Assurance Society of New York, 110 Fed. 80 (C. C. A. 3rd 1901) concerned the construction of a state statute that had previously been interpreted by state decisions which the federal court was obliged to follow.

Reference is made by the petitioner to the case of *Warren County v. Southern Surety Co.*, 34 Fed. (2d) 168 (D. C. Pa. 1929). That case did not concern the measure of damages but whether in the absence of federal authority the Court would follow the state decisions and hold that an action was not maintainable on county highway contractors' bond by the county to the use of material men for debt owing to material men by the contractor. The contract there sued upon related to a road construction within the state and, as stated by the Court, "the policy of law which concerns itself with the case is a state policy which is restricted to state constructions. The legislation is to be found in state statutes."

No state statutes are involved in the instant case nor is the question raised as to whether or not the plaintiff can maintain its action; the sole question being what is the measure of damages for breach of a completion bond. The facts presented in this case reveal that the question of the measure of damages for breach of completion bonds has a general application wherever the same may have been executed or breached and that uniformity in this matter is of as great practical importance as it is in the case of insurance policies; and that, therefore, the Federal Courts do

and should exercise their independent judgment as to the question of what is the measure of damages for a breach of such a bond.

It is therefore submitted that there is no conflict among the various Circuit Courts of Appeals, as alleged by the petitioner, with respect to the right of the Federal Courts to exercise an independent judgment concerning the measure of damages applicable in cases such as the present proceeding, but that, on the contrary, the said Circuit Courts of Appeals have under the aforesaid authorities unanimously affirmed the exercise of this right and that, therefore, the petition of The Trainor Company for a Writ of Certiorari should be denied.

Conclusion.

It is respectfully submitted that this case is not a proper one for review by certiorari in this Court. There is no substantial difference as to the measure of damages recoverable by a mortgagee-obligee for the breach of a bond guaranteeing completion of a building operation and for the breach of a bond indemnifying said obligee against loss for failure to complete. In the event that the mortgagee sues for breach of either type of bond, the measure of damages recoverable by said mortgagee-obligee is limited to the difference between the value of the property in the condition in which it was at the time of default and the amount of principal and interest due on the mortgage and all prior liens. And furthermore, since the measure of damages is a matter of general law, the Federal Court may exercise its independent judgment and apply the aforesaid measure of damages, irrespective of any decision of the local state Supreme Court which is in apparent conflict therewith.

The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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Counsel for Respondent.

April 12, 1933.